STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	))	
-vs-	)	ICC Docket No. 09-0313
Bullseye Telecom, Inc. Investigation into whether Intrastate Access Charges of Bullseye Telecom, Inc. are just and reasonable.	))))	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
MOTION TO STRIKE PORTIONS OF
BULLSEYE TELECOM, INC.'S REPLY TESTIMONY

NOW COMES the Staff of the Illinois Commerce Commission, (hereafter "Staff") through its undersigned counsel, and, pursuant to Section 200.190 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Adm. Code 200.190, hereby moves to strike portions of the Reply Testimony of Peter K. La Rose, and in support thereof, states as follows:

1. On June 26, 2009, the Staff submitted a Report to the Commission, recommending that the Commission initiate an investigation of whether BullsEye Telecom, Inc.'s (hereafter "BullsEye's") intrastate interexchange access rates were and are just and reasonable. *See, generally*, Staff Report. The Commission initiated such an investigation, the above captioned proceeding. *See, generally*, Initiating Order.

2. On October 8, 2009, pursuant to the schedule established by the Administrative Law Judge ("ALJ"), BullsEye filed a document styled "Initial Response Regarding the ICC Access Charge Investigation". *See, generally,* Initial Response. The Initial Response was verified, consisted of three pages, and advanced limited

arguments in support of the justness and reasonableness of Bullseye's intrastate interexchange access rates. First, BullsEye asserted that, inasmuch as regional bell operating companies such as the Illinois Bell Telephone Company (hereafter "AT&T") are no longer obliged to offer CLECs access to an unbundled network element platform (hereafter "UNE-P") at relatively low rates, BullsEye is obliged to pay wholesale rates to AT&T that allegedly exceed AT&T's retail rates by $10.95. Initial Response at 2. BullsEye argued that as a result, it needed to "rel[y] on revenue from Access Rates to help close this huge gap." Id. Second, BullsEye asserted that:

> Illinois consumers would best be served if BullsEye remains viable to continue to provide the competitive market that is necessary to help to limit the price increases by incumbents, including AT&T and Verizon. It is inevitable that AT&T will further increase its prices if competition decreases.
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> Id. at 2-3

BullsEye also argued that due to its small size, it incurs higher cost to provide switched access than large ILECs, and that it also does not possess pricing power in the provision of its switched access services:

> Initially, BullsEye notes that as a small Competitive Local Exchange Carrier ("CLEC"), the switched access costs that BullsEye incurs are significantly higher than the same costs incurred by a large incumbent local exchange carrier ("ILEC"). Moreover, as a small CLEC, BullsEye does not assert the type of "bottleneck" control that has led the Federal Communications Commission ("FCC") to regulate Interstate Access Charges.
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> Id. at 2

3. As stated, BullsEye advanced no other arguments regarding the justness and reasonableness of its intrastate interexchange access rates, although it had then been in possession of the Staff Report for nearly three months, from being served shortly after July 8, 2009 to October 8, 2009, when it filed its Initial Response. In particular, BullsEye: (1) presented no cost support for the rates in question; (2) did not suggest that the Commission should initiate a general proceeding to investigate CLEC access rates, rather than investigate such rates on a carrier-by-carrier basis; (3) did not suggest that it had entered into agreements with other carriers to charge lower than tariffed access rates; (4) did not argue that its costs of providing access services, and therefore interexchange access rates, are comparable to rural or small ILECs; (5) did not argue that it is otherwise comparable to small rural ILECs; and (6) did not argue that the General Assembly, by enacting Article XIII of the Public Utilities Act, had evinced a specific desire to allow the level of interexchange access rates to be set by some alleged competitive market for such services.

4. On January 11, 2010, the following parties filed Direct Testimony in response to BullsEye's Initial Response: Staff, which filed the Direct Testimony of Jeffrey H. Hoagg, Staff Ex. 1.0; Sprint Communications L.P. d/b/a Sprint Communications Company L.P. (hereafter "Sprint"), which filed the Direct Testimony of James A. Appleby, Sprint Ex. 1.0; AT&T, which filed the Direct Testimony of Lawrence J. (Larry) Bax, AT&T Ex. 1.0; and MCI Communications Services, Inc. d/b/a Verizon Business Services, Verizon Enterprise Solutions LLC and Verizon Long Distance LLC (hereafter "Verizon"), which filed the Direct Testimony of Don Price, Verizon Ex. 1.0. Each of these witnesses testified in direct response to BullsEye's Initial Response.

5. On March 1, 2009, BullsEye filed the Reply Testimony of Peter K. La Rose, not marked for identification. In his Reply Testimony. Mr. La Rose raised numerous arguments that: (a) were known and available to BullsEye at the time it filed its Initial Response, but which it did not raise in its Initial Response; and (b) were essentially responsive to the Staff Report. All of these assertions constitute improper rebuttal and should be stricken.

6. In its Initiating Order, the Commission ordered:

> Bullseye Telecom, Inc., [to] appear at a time and place established by the Administrative Law Judge or Judges appointed in this proceeding and **present evidence as to why the rates charged by Bullseye Telecom, Inc., for intrastate access are just and reasonable.**
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> Initiating Order at 2 (emphasis added)

7. Clearly, therefore, BullsEye has the burden of proof in this proceeding. The term "burden of proof" includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72; 1983 Ill. Lexis 453 at 6; 74 Ill. Dec. 40 (1983).

8. Further, the Commission has established a standard for what constitutes proper rebuttal. In its *Order,* Citizens Utilities Company of Illinois: Proposed general increase in water and sewer rates, ICC Docket No. 84-0237, 1985 Ill. PUC Lexis 38 (March 13, 1985), the Commission was called upon to decide whether a water utility could properly offer evidence, in rebuttal testimony, of certain expenses that it had failed to include in its case in chief. Citizens Utilities at 42-43 (Lexis pagination). The Commission stated that:

At the outset the Commission needs to consider the criteria by which it determines the admissibility of evidence in rebuttal. An Illinois Appellate Court case cited by Intervenors on the scope of admissible evidence on rebuttal in turn cites an earlier Illinois Supreme Court case which had considered the same issue. The Illinois Supreme Court in *Pepe v. Caputo, 408 Ill. 321, 328 (1951)* wrote:

> It is well settled that where testimony might properly have been introduced, as part of the proof in chief, it is discretionary with the trial court whether such testimony shall be admitted. (Citation omitted).

Although the Commission is not bound by strict judicial procedure in the conduct of administrative hearings, reference to judicial procedures often is useful as a matter of guidance. Illinois trial courts exercise discretion in resolving evidentiary questions regarding the proper scope of rebuttal testimony. In *Rodriguez v. City of Chicago, 21 Ill. App.3d 623 (1974),* the court listed the following criteria for exercising the discretion to allow or prohibit certain evidence:

> A party holding the affirmative can introduce in rebuttal only such evidence as tends to answer, explain, repel, contradict, or dispose of new affirmative matter introduced by the defendant. (Citation omitted).

The judicial decision suggests that the Commission should allow a Respondent in a rate case to present rebuttal evidence that is directly responsive to the testimony presented by other participants earlier in the proceeding. **Accordingly, as a general proposition, Citizens in a rate proceeding should not be permitted to raise entirely new claims for revenue during the rebuttal phase of the proceeding. The Commission will allow one significant exception to exist. To the extent that new factors affecting the revenue requirement arise subsequent to the presentation of a utility's case-in-chief, such evidence, of course, could not have been presented prior to rebuttal.**

Id. at 43-45 (emphasis added)

9. By this standard, Mr. La Rose's Rebuttal Testimony is almost entirely improper. His Rebuttal Testimony does little but raise new claims. Specifically, he first argues that the imposition of a cap upon BullsEye's interexchange access rates would adversely affect its ability to negotiate with interexchange carriers regarding access

rates. La Rose Rebuttal at 2-3. This is an entirely new claim, and moreover one of which BullsEye was or should have substantially aware, and able to raise, at the time it filed its Initial Response. BullsEye was always in a position to negotiate with interexchange carriers regarding access rates. Accordingly, lines 17 through 41 of Mr. La Rose's Rebuttal Testimony are improper rebuttal and must be stricken.

10. Mr. La Rose next contends that the Commission should address the issue of CLEC access rates in a proceeding of general applicability, rather than in one specific to BullsEye. La Rose Rebuttal at 4-5. Again, BullsEye again elected not to raise this in its Initial Response, although it was perfectly able to do so; all of the relevant facts necessary to raise this claim were in its possession at the time. Accordingly, lines 68 through 83 of Mr. La Rose's Rebuttal testimony are improper rebuttal and must be stricken.

11. Mr. La Rose next argues that the Illinois General Assembly's intent, in enacting Article XIII of the Public Utilities Act, was to reduce regulatory burdens on CLECs and permit many, if not most, intercarrier matters to be determined by the free market. La Rose Rebuttal at 7. As Article XIII has not been significantly amended in this regard since June of 2001, *see* PA 92-22 (effective June 30, 2001), this argument is untimely, and is improper rebuttal for the reasons stated above. As such, lines 111 through 126 of Mr. La Rose's Rebuttal testimony must be stricken.

12. Mr. La Rose next contends that certain ILECs charge higher interexchange access rates than BullsEye, and states that, in its Access Charge Order, the FCC specifically countenances carriers with higher costs to charge higher access

charges. La Rose Rebuttal at 4-5. As the FCC issued the Access Charge Order *nearly nine years ago*, in 2001, *see Seventh Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, FCC No. 01-146, CC Docket No. 96-262, 16 FCC Rcd 9923; 2001 FCC Lexis 2336; 32 Comm. Reg. (P & F) 576 (April 27, 2001 Released; Adopted April 26, 2001) (hereafter "Access Charge Order"), this scarcely constitutes newly-discovered evidence. Further, the ILECs in question were charging the same or similar access rates long prior to this proceeding being initiated. Thus, BullsEye's raising of the matter in rebuttal is completely untimely and improper. Accordingly, lines 164 through 204 of Mr. La Rose's Rebuttal Testimony must be stricken.

13. Mr. La Rose next alleges that BullsEye is somehow comparable to rural ILECs, and is thus entitled to charge similar access rates. La Rose Rebuttal at 12-13. Initially, Staff is compelled to note the fact that Mr. La Rose contradicts this statement in the *very next paragraph of his testimony*, *see* La Rose Rebuttal at 13 ("[T]he bulk of BullsEye's traffic originates and terminates on AT&T's network"; *none* of AT&T's service territory in Illinois is rural). Moreover the argument that BullsEye is somehow comparable to a rural carrier, even if utterly infirm, is untimely; BullsEye could have and should have raised it in its direct case. Accordingly, lines 205 through 224 of Mr. La Rose's Rebuttal Testimony must be stricken.

14. The other parties to this proceeding are substantially prejudiced by BullsEye's failure to raise any of these arguments in a timely manner. Had BullsEye raised them timely, other parties could have responded in their Direct Testimony.

Instead, the parties had nothing but the cursory Initial Response to address in testimony.

15. Finally, BullsEye should not be rewarded for not putting on its full case initially. It had ample opportunity to raise all of the points Staff has noted herein in its case in chief, and failed or otherwise declined to do so. This was BullsEye's election; it should not now be permitted to backfill the deficiencies that the parties have identified in its position as set forth in its Initial Response. To do so would be to turn the burden of proof in this case on its head.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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